

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

FEBRUARY SESSION, 1996

FILED

June 11, 1996

Cecil W. Crowson

Appellate Court Clerk

STATE OF TENNESSEE,)

C.C.A. NO. 01001-9506-CR-0196

Appellee,)

WILLIAMSON COUNTY

VS.)

HON. CORNELIA A. CLARK
JUDGE

KENNY CHEATHAM,)

Appellant.)

(Conspiracy to Sell Cocaine)

ON APPEAL FROM THE JUDGMENT OF THE
CIRCUIT COURT OF WILLIAMSON COUNTY

FOR THE APPELLANT:

FOR THE APPELLEE:

ERIC L. DAVIS
317 Main Street, Suite 208
Franklin, TN 37064

CHARLES W. BURSON
Attorney General and Reporter

ELLEN H. POLLACK
Assistant Attorney General
450 James Robertson Parkway
Nashville, TN 37243-0493

JOE D. BAUGH, JR.
District Attorney General

DEREK SMITH
Assistant District Attorney General
P.O. Box 937
Franklin, TN 37065-0937

OPINION FILED _____

AFFIRMED

DAVID H. WELLES, JUDGE

OPINION

The Defendant, Kenny Cheatham, brings this appeal as of right from a jury verdict convicting him of conspiracy to sell and deliver cocaine.¹ For this Class C felony, the jury imposed a fine of ten thousand dollars, and the trial court sentenced him as a Range I standard offender to a six-year sentence in the Department of Correction.

The Defendant presents four issues on appeal: (1) That the evidence was not sufficient to support a conviction for conspiracy to sell and deliver cocaine beyond a reasonable doubt; (2) that the trial court erred in admitting the redirect examination of Michael Buchanan; (3) that the trial court erred in admitting witness Allen Hale's rebuttal testimony concerning witness Michael Buchanan's alleged out-of-court statements; and, (4) that the trial court improperly imposed an excessive sentence. We affirm the judgment of the trial court.

The Defendant was originally charged in a nine-count indictment, including four counts charging the sale of cocaine, four counts charging the unlawful delivery of cocaine, and one count charging conspiracy to sell and deliver cocaine of .5 grams or more. The Defendant pleaded guilty to the four counts charging the sale of cocaine, and the State nolleed the four counts charging delivery of cocaine. The Defendant was tried by jury on the remaining conspiracy charge. He was found guilty and subsequently sentenced on January 23, 1995. He

¹Tenn. Code Ann. § 39-17-417.

appeals from the judgment entered on the jury verdict and the sentence imposed thereon.

I. Facts

On June 7, 1994, Doug Malinowski, a confidential informant for the Franklin Police Department, and Detective Allen Hale, an officer with the department, met to discuss an undercover narcotics investigation in the Eleventh Avenue North area of Franklin. Detective Hale set up Malinowski's car with a video camera and audio transmitter. Detective Hale proceeded with the usual search and briefing procedures used with a confidential informant and instructed Malinowski that he was to make a cocaine purchase. The officer then provided the informant with money to buy the crack cocaine. The two then drove separately to the Eleventh Avenue North area to make the purchase, and Detective Hale waited in a hidden location to monitor the purchase on audio tape.

As Malinowski drove down the street, he was hailed by Michael Buchanan. Malinowski negotiated with Buchanan to purchase eighty dollars worth of crack cocaine. Buchanan then directed Malinowski to go behind the houses that faced the street to meet the person who would supply the cocaine. There, Malinowski met the Defendant and bought eighty dollars worth of cocaine from him. Buchanan stood nearby during the transaction, and immediately after the sale, another individual, Derek "Pookie" Johnson gave the informant his name as a future reference.

Malinowski then returned to the police department followed by Detective Hale, who took the cocaine, sealed it as evidence, and submitted it to the evidence custodian. The crime lab later positively identified the substance as crack cocaine.

At trial, Detective Hale testified that, at the time of the transaction, he was familiar with both the Defendant and the co-defendant, Michael Buchanan. The entire transaction was recorded on video and audio tape, and Hale subsequently identified the Defendant as the person that sold and delivered the cocaine on the videotape. He also identified Buchanan as the co-conspirator from the tape.

II. Sufficiency of the Evidence

The Defendant first contends that the evidence is not sufficient to support a conviction of conspiracy to sell or deliver cocaine because the elements were not proven beyond a reasonable doubt. He specifically argues that the State failed to prove that the Defendant and Michael Buchanan entered into an agreement to commit the offense charged, nor that they entered into an overt act in furtherance of the conspiracy.

When an accused challenges the sufficiency of the convicting evidence, this court must review the record to determine if the evidence adduced during the trial was sufficient "to support the findings by the trier of fact of guilt beyond a reasonable doubt." T.R.A.P. 13(e). This rule is applicable to findings of guilt predicated upon direct evidence, circumstantial evidence, or a combination of

direct and circumstantial evidence. State v. Matthews, 805 S.W.2d 776, 779 (Tenn. Crim. App. 1990).

In determining the sufficiency of the evidence, this court does not reweigh or reevaluate the evidence. State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978). Nor may this court substitute its inferences for those drawn by the trier of fact from circumstantial evidence. Liakas v. State, 199 Tenn. 298, 305, 286 S.W.2d 856, 859 (Tenn. 1956). This court is required to afford the State of Tennessee the strongest legitimate view of the evidence contained in the record as well as all reasonable and legitimate inferences which may be drawn from the evidence. State v. Herrod, 754 S.W.2d 627, 632 (Tenn. Crim. App. 1988).

Questions concerning the credibility of the witnesses, the weight and value to be given the evidence, as well as all factual issues raised by the evidence, are resolved by the trier of fact, not this court. State v. Pappas, 754 S.W.2d 620, 623 (Tenn. Crim. App. 1987). In State v. Grace, 493 S.W.2d 474 (Tenn. 1973), the Tennessee Supreme Court said, "A guilty verdict by the jury, approved by the trial judge, accredits the testimony of the witnesses for the State and resolves all conflicts in favor of the theory of the State." Id. at 476.

Because a verdict of guilt removes the presumption of innocence and replaces it with a presumption of guilt, id., the accused has the burden in this court of illustrating why the evidence is insufficient to support the verdict returned by the trier of fact. State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982). This court will not disturb a verdict of guilt due to the sufficiency of the evidence unless the facts contained in the record and the inferences which may be drawn from the

facts are insufficient, as a matter of law, for a rational trier of fact to find the accused guilty beyond a reasonable doubt. Matthews, 805 S.W.2d at 780.

Tennessee Code Annotated section 39-12-103 states that the offense of conspiracy is committed if

two (2) or more people, each having the culpable mental state required for the offense which is the object of the conspiracy and each acting for the purpose of promoting or facilitating commission of an offense, agree that one (1) or more of them will engage in conduct which constitutes such offense.

(d) No person may be convicted of conspiracy to commit an offense unless an overt act in pursuance of such conspiracy is alleged and proved to have been done by the person or by another with whom the person conspired.

Tenn. Code Ann. §§ 39-12-103(a), (c).

Both the confidential informant and Detective Hale testified that Michael Buchanan hailed the informant, negotiated on the amount of drugs he wanted to purchase, and then motioned him to go around to a nearby location behind a row of houses to buy the drugs. The videotape of the transaction indicated that someone stopped the informant and questioned him as to the amount of drugs that he wanted to buy. Both witnesses identified Michael Buchanan as the one negotiating the purchase, and both identified him from the videotape as one of the men standing nearby during the transaction.

Buchanan admitted at trial that he directed the informant to go around to the back of the houses where several dealers apparently were, but he denied that he had any type of agreement to sell drugs with the Defendant. Buchanan did testify that the Defendant had given him drugs for his personal use. The State also impeached the credibility of this witness with prior inconsistent statements

that he had made to the district attorney and Detective Hale the night before in which he had said that he and the Defendant would sometimes get high together.

After observing the witnesses and hearing their testimony, the jury found that the State had proven the elements of the offense of conspiracy to sell or deliver cocaine. After reviewing the record and looking at the evidence in the light most favorable to the State, we cannot conclude that the evidence is insufficient to support the conviction. We, therefore, conclude that the evidence is sufficient to support the jury's verdict of guilty beyond a reasonable doubt.

III. Admissibility of Witness Testimony

The Defendant argues that the trial court erred in admitting the State's redirect examination of Michael Buchanan and the rebuttal testimony of Detective Allen Hale.

The State called the alleged co-conspirator, Michael Buchanan. After the State's direct examination, the defense cross-examined the witness as to the existence of a conspiratorial agreement between him and the Defendant. The witness denied that they ever had such an agreement. The defense then questioned the witness as to whether he had ever been a part of any drug transactions with the Defendant, which the witness again denied.

The prosecutor and Detective Hale had questioned the witness on the night before trial. On redirect, the State attempted to impeach the witness's testimony with several inconsistent statements which he had made during their

discussion on the previous night, which related to the conspiratorial agreement between the witness and the Defendant. The redirect examination, in part, was as follows:

Q: [MR. DAVIS]: Mr. Buchanan, do you remember telling me last night that you had received drugs from Kenny Cheatham for directing people over there to him?

A: No, I said, "We get high together," not for no -- directing nobody to him.

Q: Do you remember telling me that you would get high together because he would give you some of the cocaine to get high together?

A: We have our own.

The trial court allowed such questioning, reasoning that the defense had opened the door by asking the witness if he had even received or seen money from the Defendant for selling drugs. Because the defense opened the door, the court said that the State could ask the witness about other forms of consideration he received.

After an objection by the defense, the trial court admonished the State not to use such language as, "Do you remember telling me last night," or "Didn't I say to you?" Upon the Defendant's request, the court also gave a curative instruction to the jury that the statements or questions of counsel are not evidence, but only provide a framework for the answers that are given. The court gave a second curative instruction explaining that the prior inconsistent statements could not be considered substantive evidence, but could only be used for impeachment value in considering the credibility of the witness.

The State subsequently recalled Detective Hale to the stand as a rebuttal witness. Detective Hale testified as to the prior inconsistent statements made by Michael Buchanan on the night before trial and that during these statements, the witness testified about drug-related transactions with the Defendant.

The Defendant specifically argues that the redirect testimony of Michael Buchanan was not relevant and thereby should have been excluded under Tennessee Rule of Evidence 403. Rule 403 states that relevant evidence may be excluded if its “probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” Tenn. R. Evid. 403.

The Defendant argues that the testimony of Buchanan was cumulative evidence, that the probative value of examining the witness on the conspiratorial agreement was substantially outweighed by the danger of unfair prejudice toward the Defendant, and the risk that the testimony would mislead the jury concerning the admissibility of factual allegations stated by the prosecuting attorney.

The decision to admit or exclude evidence based on relevancy is left to the sound discretion of the trial judge, and his or her discretion will not be disturbed unless it is arbitrarily exercised. State v. Baker, 785 S.W.2d 132, 134 (Tenn. Crim. App. 1989), perm. to appeal denied, id. (Tenn. 1990). The decision of whether the probative value of evidence is substantially outweighed by the danger of confusing the issues, misleading the jury, or undue waste of time is also within the sound discretion of the trial judge. State v. Burlison, 868 S.W.2d

713, 721 (Tenn. Crim. App. 1993). Michael Buchanan's testimony was directly probative on the central issue of whether he had a conspiratorial agreement with the Defendant. We do not believe that the trial judge abused her discretion in allowing his redirect examination.

The Defendant also argues that the trial court erred in allowing the rebuttal testimony of Detective Hale in which he testified that, on the night before trial, Michael Buchanan admitted that he sent the informant to the Defendant "to get his business took care of," and that the Defendant was going to give him drugs for doing this. The Defendant contends that this testimony was not relevant under Rule 403 because the probative value was substantially outweighed by the danger of unfair prejudice, confusion of the issues, and misleading the jury. He also argues that despite the court's curative instruction, the jury's natural inclination would be to consider the detective's testimony as substantive evidence rather than using it to determine Buchanan's credibility.

Again, the decision as to the relevancy of evidence is within the discretion of the trial judge and will not be disturbed on appeal absent a showing that the judge abused that discretion. State v. Baker, 785 S.W.2d at 134; State v. Furlough, 797 S.W.2d 631, 645 (Tenn. Crim. App.), perm. to appeal denied, id. (Tenn. 1990). Hale's testimony was clearly relevant on the issue of the witness's credibility. The judge instructed the jury that Detective Hale's testimony regarding the prior statements of Michael Buchanan should only be used to determine Buchanan's credibility, not as substantive evidence. The jury is presumed to have complied with the curative instructions given by the trial court. State v. Foster, 755 S.W.2d 846, 849 (Tenn. Crim. App.), perm. to appeal denied,

id. (Tenn. 1988). We conclude that the trial judge did not abuse her discretion in admitting the rebuttal testimony, and this issue is without merit.

IV. Sentencing

Finally, the Defendant argues that the trial court imposed an excessive sentence and improperly applied the statutory enhancement factors for the conspiracy conviction.

When an accused challenges the length, range, or the manner of service of a sentence, this court has a duty to conduct a de novo review of the sentence with a presumption the determinations made by the trial court are correct. Tenn. Code Ann. § 40-35-401(d). This presumption is "conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances." State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991).

In conducting a de novo review of a sentence, this court must consider: (a) the evidence, if any, received at the trial and the sentencing hearing; (b) the presentence report; (c) the principles of sentencing and arguments as to sentencing alternatives; (d) the nature and characteristics of the criminal conduct involved; (e) any statutory mitigating or enhancement factors; (f) any statement that the defendant made on his own behalf; and (g) the potential or lack of potential for rehabilitation or treatment. Tenn. Code Ann. §§ 40-35-102, -103, and -210; see State v. Smith, 735 S.W.2d 859, 863 (Tenn. Crim. App. 1987).

If our review reflects that the trial court followed the statutory sentencing procedure, imposed a lawful sentence after having given due consideration and proper weight to the factors and principals set out under the sentencing law, and that the trial court's findings of fact are adequately supported by the record, then we may not modify the sentence even if we would have preferred a different result. State v. Fletcher, 805 S.W.2d 785, 789 (Tenn. Crim. App. 1991).

The Defendant does not contest the consecutive nature of his sentence or the aggregate length of all the sentences, but apparently only takes issue with the length of the sentence for the conspiracy conviction. He argues that he was erroneously ordered to serve the maximum sentence because the trial court improperly applied the enhancing and mitigating factors.

The trial court sentenced the Defendant as a Range I standard offender and imposed a six-year term of imprisonment on this charge. The trial court also sentenced the Defendant on the four charges of sale of cocaine to which he had pleaded guilty. The sentence for the conspiracy conviction was ordered to run concurrent to three of the counts of the sale of cocaine and consecutive to the fourth count for an effective sentence of eighteen years.

The trial court did not find any mitigating factors and applied four enhancement factors. As enhancement factors, the trial court applied factors: (1) that the defendant has a previous history of criminal convictions or criminal behavior in addition to those necessary to establish the range; (2) that the defendant was a leader in the commission of an offense involving two or more criminal actors; (8) that the defendant has a previous history of unwillingness to

comply with the conditions of a sentence involving release into the community; and (10) the Defendant had no hesitation about committing a crime where the risk to human life was high. Tenn. Code Ann. § 40-35-114.

The Defendant concedes that the application of factors (1) and (8) are appropriate. He contends, however, that the record does not support the application of factor (10). He also argues his client did not participate in a conspiracy, thus the application of factor (2), that he was the leader in the commission of the offense, was error. In the alternative, even if it is concluded that he and Michael Buchanan both participated in the sale, the proof is insufficient to show that he was the leader in the crime. We disagree. The Defendant was convicted of conspiracy. He possessed the drugs, sold and delivered the drugs to the informant, and took the money from the sale of drugs. We cannot conclude that the trial court erred in applying this factor.

The trial judge said that factor (10) was applicable because the sale of cocaine to people that the Defendant knew and knew were using cocaine regularly with an addiction problem should convince the supplier that a risk to human life and well-being existed. The State cites State v. Millbrooks, 819 S.W.2d 441 (Tenn. Crim. App. 1991), in support of the trial court's application of this factor, in which this court held that "[c]onsidering the potency of crack cocaine, it certainly can be said that there is a high risk to human life from the distribution of that substance. It can also be said that the crime involved great potential for bodily injury. . . since the use of crack cocaine is, without a doubt, injurious to the human body." Id. at 446-47.

This court has subsequently departed from the Millbrooks holding and held that the application of factor (10) cannot be used solely based on the inherent traits of cocaine such as its potential for addiction or the dangers of its use. State v. Keel, 882 S.W.2d 410, 420 (Tenn. Crim. App.), perm. to appeal denied, id. (Tenn. 1994). The potential for abuse and the psychological and physical dependency that can result from the use of the drug has already been considered by the legislature when classifying the drug as a Schedule II substance. State v. Marshall, 870 S.W.2d 532, 542 (Tenn. Crim. App.), perm. to appeal denied, id. (Tenn. 1993); see State v. Timmy Ricker, No. 269, Hamblen County, slip op. at 8 (Tenn. Crim. App., Knoxville, filed Jan. 4, 1989), perm. to appeal denied, (Tenn., filed May 8, 1989) (factor (10) not applicable because legislature sufficiently incorporated the factor into the classification schedule and again in the sentencing act). Therefore, we conclude that application of factor (10) in this instance was error.

The Defendant also contends that the record supports two mitigating factors that the trial court refused to consider: (1) that the Defendant's criminal conduct neither caused nor threatened serious bodily injury, and (3) substantial grounds exist tending to excuse or justify the Defendant's criminal conduct, though failing to establish a defense. Tennessee Code Annotated §§ 40-35-113(1), (3).

The Defendant contends that factor (1) was applicable because no one sustained any bodily injury, nor was anyone threatened with bodily injury. This court has previously stated that "given the magnitude of the problem of cocaine abuse," a defendant's sale of 2.5 grams of cocaine threatened serious bodily injury. Johnny Arwood v. State, No. 335, Hamblen County (Tenn. Crim. App.,

Knoxville, filed May 9, 1991); see State v. Roger D. Pulley, No. 01C01-9501-CC-00013, Wayne County, slip op. at 8 (Tenn. Crim. App., Nashville, filed Sept. 20, 1995) (reasoning that mitigating factor (1) not applicable when case involved the sale of large amounts of a dangerous drug). The trial court did not find this factor applicable, and maintaining the presumption of correctness, we cannot say that selling crack cocaine does not threaten serious bodily injury.

The Defendant argues that factor (3) applies, in that his conduct is excused or justified because of his drug addiction. We, however, cannot conclude that the Defendant's conduct is mitigated by the voluntary use of drugs. Thus, we cannot conclude that the trial court erred in finding no applicable mitigating factors.

Conspiracy to sell or deliver drugs is a Class C felony, with a range of three to six years. Even though the trial court erroneously applied one enhancement factor, three other enhancement factors were applicable, and none of the mitigating factors applied. Based on these findings, we cannot conclude that the trial court erred in sentencing the Defendant to the maximum sentence of six years.

The judgment of the trial court is, therefore, affirmed.

DAVID H. WELLES, JUDGE

CONCUR:

PAUL G. SUMMERS, JUDGE

JOSEPH M. TIPTON, JUDGE